TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 31

THE UNITED STATES OF AMERICA, PETITIONER

vs.

EDITH LOUISE GRIGGS, AS EXECUTRIX OF THE ESTATE OF DUDLEY B. GRIGGS, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 10, 1950
CERTIORARI GRANTED MAY 8, 1950

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. ————

THE UNITED STATES OF AMERICA, PETITIONER

vs.

EDITH LOUISE GRIGGS, AS EXECUTRIX OF THE ESTATE OF DUDLEY R. GRIGGS, DECEASED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX

1 In the United States Court of Appeals for the Tenth Circuit

No. 3806

EDITH LOUISE GRIGGS AS EXECUTRIX OF THE ESTATE OF DUDLEY R. GRIGGS, DECEASED, APPELLANT,

vs.

UNITED STATES OF AMERICA, APPELLEE

Statement of points relied upon

The appellant, Edith L. Griggs, as Executrix of the Estate of Dudley R. Griggs, deceased, in her appeal to the Circuit Court of Appeals described in Notice of Appeal intends to rely on appeal on the following points:

1. The District Court erred in granting the defendant's Motion to Dismiss and such order was contrary to the law.

2. The District Court erred in entering final order of September 8, 1948, dismissing this action and such order was contrary to law.

FREDERICK P. CRANSTON,
One of the Attorneys for Appellant, Edith L. Griggs as Executrix of the Estate of Dudley R. Griggs, deceased.

Received copy of above this 16 day of November 1948.

MAX M. BULKELEY,
United States District Attorney.
HENRY E. LUTZ,
Assistant United States District Attorney,
Attorney for Appellee.

2 United States Court of Appeals

Order re printing of record

November 18, 1948

Thirty-eighth Day, September Term, Thursday, November 18th, A. D. 1948. Before Honorable Orie L. Phillips, Chief Judge.

This cause came on to be heard on the motion of appellant to delay the printing of the record in this cause until thirty days after the Supreme Court of the United States has passed upon the petition for a writ of certiorari in the case of United States vs. Brooks, 169 F. 2d 841.

It appearing that the same issues are involved in this case as in the case of United States vs. Brooks, it is now here ordered that the printing of the record in this cause be delayed until thirty days after the Supreme Court of the United States has passed upon the case of United States vs. Brooks.

In the District Court of the United States for the District of Colorado

Pleas and proceedings before The Honorable J. Foster Symes, Judge of the United States District Court for the District of Colorado, presiding in the following entitled cause:

EDITH LOUISE GRIGGS, AS EXECUTRIX OF THE ESTATE OF DUDLEY R. GRIGGS, DECEASED, PLAINTIFF

vs.

UNITED STATES OF AMERICA, DEFENDANT

No. 2448.-Civil

Complaint

Filed May 27, 1948

Comes now the plaintiff by her attorneys, Frederick P. Cranston and L. James Arthur, and for a claim against the defendant alleges:

1. This action is brought under authority of 28 U. S. Code Annotated, Sec. 931, Subsection (a), commonly known as the Tort Claims Act.

2. On May 17, 1948 plaintiff was appointed by the County Court of the City and County of Denver as Executrix of the Estate of Dudley R. Griggs, Deceased, and she is now the Executrix of such Estate, and the personal representative of decedent, Dudley R. Griggs.

3. Plaintiff is a resident of the District of Colorado, and Dudley R. Griggs at the time of his death, as hereinafter described, was a resident of the District of Colorado.

4. On or about November 30, 1947, Dudley R. Griggs was a Lt. Colonel in the Army of the United States, and was on active duty in such Army. On or about such date he was admitted under official orders to the Army Hospital at Scott Field Army
4 Air Base, an institution under the exclusive control of the defendant, located in St. Clair County in the Eastern District of Illinois, for the purpose of submitting to treatment and an operation, and he remained under the sole and exclusive control of the defendant until his death.

5. While at such hospital as aforesaid, Dudley R. Griggs, was placed under the care of certain employees of the Medical Corps of the United States Army, being Agents of the defendant, all of whom were in the employ and under the control of the defendant, which employees undertook to use reasonable diligence and skill as medical officers of the United States Army, authorized to prac-

tice anywhere in the world, which employees undertook the diagnosis of the malady and treatment therefor.

6. Between November 19, 1947 and December 18, 1947 in the State of Illinois, the defendant and its Agents negligently, carelessly and unskillfully performed certain acts and failed to give prompt and reasonable and skillful treatment, and by acts of negligence and carelessness failed to exercise the degree of care and skill prescribed by the Medical Branch of the United States Army, as a result of which death of Dudley R. Griggs occurred on December 18, 1947 in the City of St. Louis, Missouri.

7. The death of Dudley R. Griggs is a direct and proximate result of the carelessness, negligence and unskillfulness of the defendant and its Agents, all of whom were under the employ and direct control of defendant, and such death was caused by the negligent acts and omissions of one or more employees of defendant while acting within the scope of office and employment of such person or persons, and under circumstances where a private person would be liable for such death in accordance with the law of Illinois where the acts and omissions occurred, and were caused by the wrongful acts, neglect and defaults of officers and employees of the defendant.

8. The following extracts appearing in Smith-Hurd, Ill. Ann. Statutes, Ch. 70, at the times herein mentioned, were and they now are the law of Illinois:

SECTION 1. Action for Damages.

Be it enacted by the People of the State of Illinois represented in the General Assembly: Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

SECTION 2. Action By whom brought—Limit of Damages—Death outside State.

Every such action shall be brought by and in the names of the personal representatives of such deceased person and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate and in every such action the jury may give such damages as they shall deem a fair and just

compensation with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person not exceeding the sum of $15,000: Provided, that every such action shall be commenced within one year after the death of such person. Provided, further, that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place.

6 9. The law of Illinois as interpreted by its Courts is to the effect that the last proviso of Section 2 hereinabove set forth, does not apply where death occurs outside of Illinois under circumstances where the wrongful act, neglect or default occurred in Illinois.

10. Dudley R. Griggs left surviving him the plaintiff, who is his widow, and Dudley R. Griggs, Jr., who is the son and only child of Dudley R. Griggs, of the age of sixteen years, the plaintiff and Dudley R. Griggs, Jr., being the only heirs and next of kin of Dudley R. Griggs, and this action is brought by the plaintiff for the exclusive benefit of herself and Dudley R. Griggs, Jr.

11. The plaintiff as Executrix and as widow, and Dudley R. Griggs, Jr. as his son, as a result of the foregoing, have sustained damages in the sum of Fifteen Thousand Dollars ($15,000).

Wherefore Plaintiff prays judgment against defendant in the sum of $15,000; for her costs in this action expended, and for such other and further relief as to the Court may seem proper.

FREDERICK P. CRANSTON,
L. JAMES ARTHUR,
Attorneys for Plaintiff.

Filed May 27, 1948.

In United States District Court

Motion of defendant for dismissal

Filed July 26, 1948

Comes now the United States of America, the defendant above named, by the United States Attorney for the District of Colorado, and moves the court for the dismissal of this cause upon the grounds following:

1. That the complaint herein fails to state a claim upon which relief can be granted.

2. That it appears that all and singular the matters complained of were necessarily performed in the exercise of a discre-

7 tionary function or duty on the part of the employees of the government so performing the same; and, accordingly,

the claim herein asserted is exempt from suit perforce Section 943, Title 28, United States Code.

MAX M. BULKELEY,
United States Attorney for the District of Colorado.
HENRY E. LUTZ,
Assistant United States Attorney for the District of Colorado.

Filed July 26, 1948.

IN UNITED STATES DISTRICT COURT

Order of dismissal

September 8, 1948

At this day comes the plaintiff by L. James Arthur, her attorney, and the defendant by Henry E. Lutz, Assistant District Attorney, also comes, and thereupon, on motion of the defendant:

It is ordered by the Court that the above-entitled action and complaint be, and the same is hereby dismissed out of this court, with prejudice.

Entered on the Docket September 8, 1948.

In United States District Court

Notice of appeal

Filed October 6, 1948

Notice is hereby given that Edith Louise Griggs as Executrix of the estate of Dudley R. Griggs, deceased, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the order dated September 8, 1948, granting the defendant's motion to dismiss and entering the final judgment dismissing this action.

FREDERICK P. CRANSTON,
L. JAMES ARTHUR,
Attorneys for Plaintiff, Edith L. Griggs as Executrix of the Estate of Dudley R. Griggs, Deceased.

8 Received copy of above this 6th day of October 1948.
HENRY E. LUTZ,
Asst. U. S. Atty.

Filed October 6, 1948.

[A bond on appeal was filed October 6, 1948.]

[Clerk's certificate to foregoing transcript omitted in printing.]

9 In United States Court of Appeals, Tenth Circuit

And thereafter the following proceedings were had in

said cause in the United States Court of Appeals for the Tenth Circuit:

Record Entry: Cause Argued and Submitted

First Day, September Term, Monday, September 12th, 1949. Before Honorable Orie L. Phillips, Chief Judge, and Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard and was argued by counsel, Frederick P. Cranston, Esquire, appearing for appellant, Henry E. Lutz, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

10 In United States Court of Appeals

Opinion

November 16, 1949

Frederick P. Cranston (L. James Arthur was with him on the brief) for Appellant.

Henry E. Lutz, Assistant United States Attorney for the District of Colorado (Max Bulkeley, United States Attorney for the District of Colorado, was with him on the brief) for Appellee.

Before PHILLIPS, Chief Judge and HUXMAN and MURRAH, Circuit Judges.

MURRAH, Circuit Judge, delivered the opinion of the court.

By this appeal we are asked to decide a question directly presented and decided in Jefferson v. United States, 74 F.
11 Supp. 209 and 77 F. Supp. 706, and discussed but not decided in Brooks v. United States, 337 U. S. 49, namely, whether the United States is liable under the Federal Tort Claims Act, as amended, 28 U. S. C. A. Secs. 1346 (b), 2671–2680, for the death of a member of the armed forces on active, but not combat, duty, allegedly caused by the negligence of employees of the United States Government, while acting in the scope of their office or employment.

The facts are not in dispute. On or about November 20, 1947, Dudley R. Griggs, a Lt. Colonel on active duty in the United States Army, was admitted under official orders to the Army Hospital at Scott Field Air Base in the State of Illinois, for the purpose of surgery and treatment. Death occurred while under treatment and the widow, as executrix, brought this action against the United States in the United States District Court of Colorado, to recover damages for his wrongful death, allegedly caused by the negligent, careless and unskillful acts of members of the Army Medical Corps, while acting in the scope of their office or employment. The trial court sustained a motion to dismiss on the

grounds that the complaint did not state a claim on which relief could be granted under the Act, and entered judgment in favor of the United States.

The Federal Tort Claims Act, by its terms gives the United States District Courts exclusive jurisdiction of civil actions on claims against the United States on account of personal injuries caused by the negligent or wrongful acts of any employee of the United States, while acting within the scope of his office or employment, under circumstances where the United States as a private person would be liable to the claimant for such injuries in accordance with the law of the place where the act occurred.

In the Brooks case, the asserted claims against the United States, for injuries to one serviceman and death to another, arose
12 while the soldiers were on furlough, and not in any way incident to their military service. The Supreme Court was not "persuaded" that the words "any claim" meant "any claim but that of servicemen", and therefore held the asserted claims within the coverage of the Act.[1] It did not reach the point suggested there, and present here, whether "an army surgeon's slip of hand, [or] a defective jeep which causes injury", would ground tort claims against the United States. It left for future consideration whether the omission of Congress to exclude claims for injuries or death incident to active service meant that it intended to include every such claim against the Government, or whether the results of such claims would be so "outlandish" or absurd as to put them outside the scope and purpose of the legislation, and hence justify a judicially imposed limitation, which the Congress omitted to provide.

Invoking familiar canons which sanction judicial construction of legislative words and prases to comport with the obvious Congressional intent, Judge Chesnut, in the Jefferson case, pointed to the historical and unique Government-soldier relationship, and concluded that the obvious purpose of Congress was to exclude claims of soldiers arising out of that relationship from coverage of the Act. In referring to the nature of the Government-soldier relationship he pointed to the "large body of federal legislation" providing disability benefits to servicemen and gratuity payments to their survivors, as indicative of congressional intent. But the Supreme Court in the Brooks case was not moved by such considerations.

13 The terms of the statute are clear, and appellant's action for a money judgment based upon the negligence of army

[1] By the 1948 revision of the United States Code, the Federal Tort Claims Act was amended, and Section 931 which provided exclusive district court jurisdiction of "any claim against the United States" now provides exclusive jurisdiction "of civil actions on claims against the United States."

We do not regard the changed phraseology as indicating a congressional purpose to narrow the scope of jurisdiction under the Act. The Government does not so contend.

surgeons states a cause for relief under the Act, unless it falls within one of the twelve exceptions specifically provided therein; or, unless from the context of the Act it is manifestly plain that despite the literal import of the legislative words, Congress intended to exclude from coverage civil actions on claims arising out of a Government-soldier relationship.

Only two of the exceptions could be pertinent to our question. Subsection (a) excludes claims based upon the exercise or performance or the failure to exercise or perform a discretionary function, and subsection (j) exempts any claim arising out of the combatant activities of the armed forces. It is manifestly plain that the alleged acts of negligence, while involving skill and training, were nondiscretionary. Cf. Denny v. United States, 171 F. 2d 365. The claim arose after hostilities had ceased, and the Government makes no contention that it falls within exception (j).

With deference to the views of the learned judge, in the Jefferson case, we fail to find anything in the context of the Act or its legislative history justifying judicial limitation upon the claims of servicemen. As pointed out in the Brooks case, there were eighteen tort claims bills introduced in Congress between 1925 and 1935, all but two of which contained provisions expressly exempting claims of members of the armed forces. When, however, the Congress finally came to confer jurisdiction of the District Courts over tort claims against the United States, it conspicuously omitted to exclude claims growing out of a government-soldier relationship. We think the only logical conclusion is that it deliberately refrained from doing so. If the result of its omission to exempt such claims leads to dire consequences and absurd results, it is for Congress and not this Court to provide rational limitations.

14 We hold that the claim states a cause of action over which the court had jurisdiction, and the case is therefore reversed.

HUXMAN, Circuit Judge, dissenting:

While the question is not free from doubt, I find myself unable to agree with the conclusions reached by my associates.

The precise question involved here was alluded to by the Supreme Court in Brooks v. United States, 337 U. S. 49, but an answer thereto was not necessary to the decision in that case. No doubt, the question ultimately will be answered by the Supreme Court when it is appropriately and necessarily raised in a case before that tribunal.

In Jefferson v. United States, 77 F. Supp. 706, Judge Chesnut, in an able and exhaustive opinion, reviewed the history of the Federal Tort Claims Act and reached the conclusion that it was not intended to cover service-connected injuries sustained by members of the Armed Forces while in such service. I subscribe to the

philosophy of the Jefferson case. I can add nothing of value to the logic or reasoning of that opinion. In the interest of brevity, I adopt the reasoning of the Jefferson case and make it the basis of this dissent.

15 In United States Court of Appeals

Judgment

November 16, 1949

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said district court for further proceedings in accordance with the views expressed in the opinion of the court.

On December 1, 1949, an order was entered extending the time for appellee's petition for rehearing to December 30, 1949.

18 In United States Court of Appeals

Petition of the United States for rehearing

Filed December 27, 1949

On November 16, 1949, this Court, with Judge Huxman dissenting, reversed the decision of the District Court of the District of Colorado and held that the Federal Tort Claims Act authorizes the entry of a judgment for damages for the death of an Army officer who was killed, allegedly through the negligence of other Army personnel, while on active duty and as an incident to his service. For the reasons set forth hereinafter, the United States urges this Court to grant a rehearing, to reconsider its holding, and to affirm the decision of the District Court.

GROUNDS OF PETITION

This petition is based mainly on our conviction that this Court has misconceived the clear implication of the language of
19 the Supreme Court in Brooks v. United States, 337 U. S. 49. In Point I we discuss the Brooks case and two very recent decisions by the Court of Appeals for the Second Circuit and by the Court of Appeals for the Fourth Circuit. Those two decisions are in direct conflict with this Court's decision in the instant case. The Second and Fourth Circuits, in interpreting the implication of the Supreme Court's opinion in the Brooks case,

have unanimously ruled that an Army officer's service-incident injury or death is not compensable under the Federal Tort Claims Act. Feres v. United Stats, — F. 2d — (C. A. 2), decided November 4, 1949, see Appendix, infra, p. 19; Jefferson v. United States, — F. 2d — (C. A. 4), decided December 19, 1949, see Appendix, infra, p. 23. We also undertake in Point I to reenforce our view by the circumstance that the Federal Tort Claims Act has supplanted the Military Claims Act under which a service-incident death was not compensable.

In Point II, we point out that a refusal to award appellant damages under the Federal Tort Claims Act for her husband's service-incident death does not leave here remediless, but that the United States, in fact, under other federal statutes, is already compensating her for that death.

I

Brooks v. United States, 337 U. S. 49 Precludes Recovery of Damages Under the Federal Tort Claims Act for an Army Officer's Service-Incident Death

A. THE OPINION OF THE SUPREME COURT IN BROOKS V. UNITED STATES, 337 U. S. 49

There is no doubt, as pointed out by this Court in the opnion in the instant case, that the Supreme Court, in the Brooks case, did not decide the question as to whether the Federal Tort Claims Act covers a claim arising out of the service-incident death of a member of the armed forces on active duty. This Court's opinion also points out, however, that while that question was "not decided in Brooks v. United States," it certainly was "discussed" there by the Supreme Court, — F. 2d —. That discussion has a vital bearing on the question now here. Although the Supreme Court stated that "no opinion" was expressed as to the question now before this Court, the whole burden of its discussion and the clear implication to be drawn therefrom is that while servicemen's claims for injuries or death *not* incident to military service fall within the Act, the Act does not apply to claims for injuries or death incident to their military service.[1]

[1] Although Justices Frankfurter and Jackson dissented from the Supreme Court's opinion in the Brooks case, they obviously shared the majority's view that service-incident injuries are not compensable under the Federal Tort Claims Act. In noting their dissent, the two Justices expressly adopted the reasoning of Judge Dobie's decision in the Court of Appeals (337 U. S. 49, 54). That decision, in turn, emphasizes the fact that there is "added and greater reason for denying recovery where the injury is service-caused (the Jefferson case) than where the injury is not service-caused (the Brooks case)." 169 F. 2d 840, 844. See fn. 6, infra, p. 8. In addition, it should be noted that Judge Dobie joined in the recent unanimous decision by the Court of Appeals for the Fourth Circuit holding that Jefferson's service-incident injury is not compensable under the Federal Tort Claims Act. Jefferson v. United States, — F. 2d — (C. A. 4), decided December 19, 1949, see Appendix, infra, p. 23.

The reasoning of the Supreme Court in pointing out
21 how it reached the conclusion in the Brooks case that it did permits no other conclusion. Thus, in presenting the question there decided, the Supreme Court stated (337 U. S. 49, 50): "The question is whether members of the United States armed forces can recover under that Act for injuries *not* incident to their service."[2] Then, after setting forth the facts which showed that the soldiers there involved were riding in their private automobile on a public highway when they were struck by a government vehicle, the Supreme Court stated (337 U. S. 49, 52):

"We are dealing with an accident which had nothing to do with Brooks' army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired. Were the accident incident to the Brooks' service, *a wholly different case would be presented.*"

In order to illustrate the "wholly different" case which would be presented under the Federal Tort Claims Act, the Supreme Court specifically referred to a tort action grounded on "an army surgeon's slip of hand" and then cited the decision handed down by District Judge Chesnut in Jefferson v. United States, 77 F. Supp. 706 (later affirmed by the Court of Appeals for the Fourth Circuit, see Appendix, infra, p. 23), together with two other decisions in which the Court of Appeals for the Second Circuit had decided that service-incident deaths of Naval personnel are not compensable under other federal statutes allowing suits on
maritime claims arising out of tortious acts of government
22 servants. Dobson v. United States, 27 F. 2d 807 (C. A. 2), certiorari denied, 278 U. S. 653, and Bradey v. United States, 151 F. 2d 742 (C. A. 2), certiorari denied, 326 U. S. 795, rehearing denied, 328 U. S. 880.

After citing those cases, the Supreme Court stated that while they were not relevant to the actual case before it (i. e., a non-service-incident injury or death) and would not therefore be followed there, they would have relevance "in its context" (i. e., in a service-incident situation, such as was involved in the Dobson, Bradey, and Jefferson cases as well as in the instant case). The Supreme Court thus clearly indicated that those cases are squarely in point in the instant situation and should therefore, we submit, be followed here.[3]

23 More than case law was relied on by the Supreme Court in stressing the need for differentiating between service-

[2] Unless otherwise noted, the italics appearing in this petition have been supplied.
[3] The district court's opinion in the Jefferson case was discussed in both the majority and minority opinions of this Court. The Court of Appeals for the Fourth Circuit, on December 19, 1949, unanimously affirmed the district court holding that a soldier's service-incident injury, caused by alleged malpractice of an army surgeon, is not compensable under the Federal Tort Claims Act (Jefferson v. United States, — F. 2d —

incident and non-service-incident situations under the Federal Tort Claims Act. Thus, the Court noted the "similar distinction in 31 U. S. C. 223b." That statute, known as the Military Claims Act, authorizes the Secretary of the Army to settle claims of military personnel for injury or death caused by other military personnel *except* where the injury or death was incident to the claimant's military service. The Military Claims Act thus reflects the general congressional policy of limiting the claims of servicemen for injuries incident to their service to pensions or other veterans' disability benefits. In view of the nature of the statute and its exclusion of service-incident situations, the Supreme Court's reference to that statute, like the reference to the Dobson, Bradey and Jefferson cases, constitutes a clear indication that the same distinction must be adhered to under the Federal Tort Claims Act.

In still further stressing the need for that distinction, the Supreme Court pointed out that there were sound reasons for attributing to Congress an intent to recognize non-service-incident claims under the Federal Tort Claims Act and at the same time an intent "to leave injuries incident to service where they were." Leaving service-incident claims "where they were" is, of course, another way of saying tha. since they were not recognized
24 by Congress in the Military Claims Act nor by the courts in the Dobson and Bradey cases,[4] they should not be considered actionable under the Federal Tort Claims Act.

The reasoning underlying the Supreme Court's distinction between the service-incident-injury situation presented by the instant case and the non-service-incident-injury in the Brooks

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(C. A. 4), see Appendix, infra, p. 23). The other two cases cited by the Supreme Court, i. e., the Dobson and Bradey cases, also involved factual situations peculiarly similar to those presented by the instant case. In both of those cases, servicemen lost their lives as an incident of their naval service and due to the negligence of other naval personnel. And, in both cases, the Court of Appeals for the Second Circuit, in unanimous opinions which the Supreme Court refused to review on petitions for certiorari, ruled that, despite the absence of any express exclusionary provision in the Public Vessels Act, that Act did not authorize a recovery against the United States for the death of a member of the armed forces incurred incident to his service. Dobson v. United States, 27 F. 2d 807 (C. A. 2), certiorari denied, 278 U. S. 653, and Bradey v. United States, 151 F. 2d 742 (C. A. 2), certiorari denied, 326 U. S. 795, rehearing denied, 328 U. S. 880.

[4] All of the cases involving service-incident claims under other federal legislation authorizing suits against the United States are in accord with the Dobson and Bradey cases. Thus, in the period of federal control of the railroads during World War I, the Director General of the Railroads was subjected to liability in suits for personal injury and death to the same extent that the railroad carrier would have been liable in the absence of federal control. Act of March 21, 1918 (40 Stat. 451, 456). These suits, instituted against the Director General, were held to be suits against the United States (Missouri Pacific Railroad Co. et al. v. Ault, 256 U. S. 554, 561; Dahn v. Davis, 258 U. S. 421, 428; 32 Opinions Attorney General 531, 535 (1921)). While the Railroad Control Act did not expressly exclude claims based on the death or injury of a member of the armed forces incurred incident to his military service, the courts to which the question was presented uniformly held that the Act did not authorize recovery on such claims. Seidel v. Director General of Railroads (149 La. 414, 89 So. 398) held that a sailor could not recover, under the Act, for personal injuries sustained while in line of duty. Again, in Moon v. Hines, Director General of Railroads (205 Ala. 355, 87 So. 603), the court sustained a judgment for defendant in a suit by a soldier for personal injuries sustained while traveling on a railroad in the course of his official duty. See, to the same effect, Bryson v. Himes, 268 Fed. 290 (C. A. 4); Sandoval v. Davis, 288 Fed. 56 (C. A. 6); and cf. Posey v. T. V. A., 93 F. 2d 726 (C. A. 5). See also Goldstein v. New York, 281 N. Y. 396, 24 N. E. 2d 97.

case, is apparent. In the Brooks case, the soldiers were "on leave or furlough engaged in their private concerns and not on any
25 business connected with their military service" (United States v. Brooks, 169 F. 2d 840, 841 (C. A. 4)). They were not on the highway, where they were hit by the Government car, because of their being soldiers. The accident, out of which their claims under the Act arose, was not caused by their military service, nor did any of their military responsibilities, assignments, or activities have any relationship with the accident. In fact, since they were on leave, it is obvious that no military requirement had directed them to be on that highway or in the car involved in the accident. They were, at that time, on their own and voluntarily spending their leave in the manner they had selected for their own personal convenience.[5]

In sharp contrast are the facts of the instant case: Here there was no leave or furlough. It was only because Lt. Colonel Griggs was a soldier on active duty that he was operated on by an Army doctor on an Army operating table in an Army hospital, where the alleged negligence occurred.[6] His being on active
26 duty in the Armed Forces required him to submit to that operation by an Army surgeon only because of the military relationship between the two of them. Had he refused medical or surgical treatment considered "necessary to enable [him] to perform properly his military duties" he would have been guilty of a

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[5] The Supreme Court has stated that while on leave, a serviceman "is at liberty to go where he will during the permitted absence, to employ his time as he pleases, and to surrender his leave if he chooses." United States v. Williamson, 23 Wall. 411, 415. The leave "is a favor extended for his sole accommodation" to permit him to "enjoy a respite from military duty." Foster v. United States, 43 C. Cls. 170. "A leave of absence or a furlough is a favor extended. A soldier cannot have a furlough forced on him." Hunt v. United States, 38 C. Cls. 704, 710.

[6] When the Brooks case was first before the Court of Appeals for the Fourth Circuit, both the majority and minority opinions stressed the difference between the non-service-incident-injury in the Brooks case and the service-incident-injury in the Jefferson case. Thus, Judge Dobie stated (169 F. 2d 840, 844–845):

"There is a clear factual distinction between the Jefferson case and the case before us (i. e., the Brooks case). There the injury was service-caused since the claim was based on the negligence of an army surgeon while performing a surgical operation on the soldier. With us, the injuries were service-connected though not service-caused; for, at the time of the accident, appellees were on furlough or leave, riding in their privately owned automobile. Counsel for appellees, relying heavily on this factual distinction between the two cases, contend that the Jefferson decision does not control the instant case.

"We readily admit the added and greater reason for denying recovery where the injury is service-caused (the Jefferson case) than where the injury is not service-caused (the present case). It is easy to conjure up the unfortunate results, including the subversion of military discipline, if soldiers could sue the United States for injuries incurred by reason of their being in the armed service of their country. If soldiers could sue for such injuries as illness based on the alleged negligence of the company cook or mess sergeant, or if soldiers who contract sickness on wintry sentry duty had a right of action against the Government on the allegation of a negligent order given by the company commander, then the traditional grousing of the American soldier would result in the devastation of military discipline and morale."

And Chief Judge Parker, in dissenting, pointed out (169 F. 2d 840, 850):

"It should be noted that the claims in suit here [i. e., the Brooks case] do not arise out of injuries connected with the military service of plaintiffs, as was the case in Jefferson v. United States, 77 F. Supp. 706. Entirely different considerations might operate to deny recovery in such case, as is suggested in the opinion of Judge Chesnut." These views were reiterated even more forcefully by the Court of Appeals for the Fourth Circuit in its unanimous holding in the Jefferson case. See Appendix, infra, p. 22.

breach of military discipline and subject to trial by court
27 martial. AR 600–10, Sec. (e) (9). In the absence of his military obligations and in the absence of his active duty status the particular negligence now complained of would not have taken place. As appellant herself emphasizes in the complaint it was while her husband "was on active duty" as a "Lt. Colonel in the Army of the United States" that "official orders" directed him to the "Army Hospital at Scott Field Army Air Base * * * for the purpose of submitting to treatment and operation" (R. 3–4).

Since the death here involved was sustained not while the Army officer was on leave,[7] but as a direct incident of his military service, we submit that the instant case calls for application of that part of the Brooks case which would preclude the recovery of damages under the Federal Tort Claims Act for service-incident deaths.

Any other conclusion would, as observed by the Court of Appeals for the Fourth Circuit in the Jefferson case, impair "essential military discipline":

"* * * It seems unreasonable, however, to conclude
28 that Congress * * * intended * * * to subject every injury sustained by a member of the armed forces in the execution of military orders to the examination of a court of justice if the injured person should make the claim that his injury was caused by the negligence of a superior officer. If this were so, the civil courts would be required to pass upon the propriety of military decisions and actions and essential military discipline would be impaired by subjecting the command to the public criticism and rebuke of any member of the armed forces who chose to bring a suit against the United States. We think this consideration too weighty to be swept aside by adverting to the exceptions relating to military personnel which were contained in bills submitted to Congress when the matter was under examination. When a statute is subjected to the interpretation of the courts, too much weight should not be given to the language contained in discarded or to the statements of legislators in the course of debate. Order of Conductors v. Swan, 329 U. S. 520, 529. Jewell Ridge Corp. v. Local, 325 U. S. 161, 168. (See Appendix, infra, p. 27)."

* * * * *

[7] Decisions of the Judge Advocate General make it clear that the damages sustained by a serviceman will be deemed "not incident to his service," where, as in the Brooks case, and unlike the instant case, the serviceman was on authorized leave or pass at the time of the accident. JAG Bulletin, vol. 3, pp. 155, 427 (1944). However, where an officer reported to an Army hospital for treatment and claimed damages for his clothing which had been damaged at the hospital, the Judge Advocate General ruled that the damages occurred incident to the officer's service and that the claim must therefore be disallowed under the Act of July 3, 1943, as amended, 57 Stat. 372, 31 U. S. C. 223b. JAG Bulletin, vol. 3, p. 67 (1944).

B. THE COURT OF APPEALS FOR THE SECOND CIRCUIT, IN FERES V. UNITED STATES, AND THE COURT OF APPEALS FOR THE FOURTH CIRCUIT IN JEFFERSON V. UNITED STATES, HAVE ALREADY DECIDED THAT A SERVICE-INCIDENT INJURY OR DEATH IS NOT ACTIONABLE UNDER THE FEDERAL TORT CLAIMS ACT

At the time the decision in the instant case was handed down by this Court it did not have before it the November 4, 1949, decision of the Court of Appeals for the Second Circuit in Feres v. United States, — F. 2d —, on the precise question now here. That decision is set forth in full in the Appendix, infra, p. 19.

29 Moreover, ~~on~~ December 19, 1949, the Court of Appeals for the Fourth Circuit also handed down its decision in Jefferson v. United States, — F. 2d —, on the precise question now here. That decision is also set forth in full in the Appendix, infra, p. 23.

The Feres case, like this one, involved the death of an officer of the armed forces where such death was incident to his military service and caused by the negligence of other military personnel. There, too, it was contended that the Federal Tort Claims Act embraced such claims. The Court of Appeals for the Second Circuit in a unanimous opinion rejected that contention and after quoting from the Supreme Court's opinion of the Brooks case, observed that there was—

"no reason for not adhereing to the view we took as to damage claims of military personnel in Dobson v. United States, supra, and Bradey v. United States, supra, and that which Judge Chesnut took in Jefferson v. United States, 77 F. Supp. 706, now on appeal in the Fourth Circuit. If more than the pension system had been contemplated to recompense soldiers engaged in military service we think that Congress would not have left such relief to be implied from the general terms of the Tort Claims Act, but would have specifically provided for it. The only exception to this interpretation of the statute which seems to have been recognized by the Supreme Court in the Brooks case applied to situations where military personnel were not on active duty." (See Appendix, infra, p. 22.)

Similarly, in the Jefferson case, where a soldier sued for
30 personal injuries resulting from an operation performed on him by an Army surgeon at an Army hospital, the Court of Appeals for the Fourth Circuit unanimously held that a soldier may not recover for service-incident injuries even though he may recover for nonservice incident injuries.

The Jefferson and Feres cases recognize the need for distinguishing between service-incident and non-service-incident claims as stressed by the Supreme Court's opinion in the Brooks case.

Those two cases give full effect to the Brooks' opinion's clear implication that service-incident claims are not actionable under the Federal Tort Claims Act, and should, we submit, be followed here.

C. CONSTRUING THE FEDERAL TORT CLAIMS ACT IN THE LIGHT OF THE MILITARY CLAIMS ACT WHICH IT SUPPLANTED, CONFIRMS THE VIEW THAT CONGRESS INTENDED TO EXCLUDE SERVICE-INCIDENT INJURIES AND DEATHS FROM THE FEDERAL TORT CLAIMS ACT.

The Military Claims Act (31 U. S. C. 223b), as noted supra, p. 6, authorizes the Secretary of the Army to settle claims of military personnel for injury or death caused by other Army personnel except where the injury or death occurred incident to the soldier-claimant's military service.[8] The instant claim, arising out of a service-incident situation, would not have been cognizable under that Act. Section 424a of the Federal Tort Claims Act (60 Stat. 846) repealed the Military Claims Act insofar as it covered matters otherwise cognizable under the Federal Tort Claims Act.[9] That repeal certainly was not intended to
31 make cognizable under the Federal Tort Claims Act claims which had theretofore never been recognized under the repealed statute. To the contrary, application of the well-established rule that a new or substitute statute must be interpreted in light of the enactment which it supplanted, fortifies the conclusion that the Federal Tort Claims Act, just like its predecessor Military Claims Act, does not include claims by servicemen for injury or death sustained by them incident to their military service and as a result of the negligence of other military personnel. See Samson v. United States, 79 F. Supp. 406, 408 (S. D. N. Y.); see Jefferson v. United States, 77 F. Supp. 706, 715 (D. C., Md.).

II

EVEN THOUGH APPELLANT IS NOT ENTITLED TO RECOVER DAMAGES UNDER THE FEDERAL TORT CLAIMS ACT, SHE IS ENTITLED TO FULL BENEFITS AND PAYMENTS FROM THE UNITED STATES UNDER THE APPROPRIATE MILITARY AND VETERANS' BENEFIT LAWS

For the reasons set forth above, we submit that the district court properly refused to award appellant damages under the Federal Tort Claims Act for the death of her husband incurred incident to his service and as a result of the negligence of other military personnel. That does not mean, however, that the United States, under other statutes and regulations, is not com-

[8] A similar statute confers identical authority upon the Secretary of Navy with respect to torts of naval personnel. 31 U. S. C. 223d.
[9] It also repealed the Navy statute referred to in the preceding footnote.

pensating appellant for her financial loss. She is still entitled to the full benefits and payments under the appropriate military and veterans' benefit laws. In fact, as stated in the letter from the Veterans' Administration, reprinted in the Appendix
32 (infra, p. 28), appellant, in the two year period since her husband's death, has already received from the United States, on account of the death of her husband in service, pension payments in excess of $2,100. It is also estimated that she will receive future similar payments aggregating an additional $18,000.[10] Moreover, as stated in a letter from the Department of the Army (Appendix, infra, p. 30), appellant has also been paid, because of the death of her husband in service, the sum of $2,695, representing the six months' death gratuity under the Act of December 17, 1919, as amended, 41 Stat. 367, 57 Stat. 599, 10 U. S. C. 903.[11]

It is significant to note that these payments under the military and veterans' laws total an expected amount in excess of $22,000. This figure must be compared with the $15,000 limitation imposed by Illinois law on recoveries in wrongful death actions. Act
33 of July 18, 1947, Laws of Illinois, 1947 (p. 1094).[12] As pointed out by appellant in her complaint, that limitation is applicable to the instant suit under the Federal Tort Claims Act (R. 5, 6). Thus, even if there were liability here on the part of the United States under the Federal Tort Claims Act, that liability could not exceed the sum of $15,000 diminished by the value of past and prospective payments made by the United States to appellant under the military and veterans' laws on account of the same death which forms the basis of the instant action. United States v. Brooks, 176 F. 2d 482 (C. A. 4).[13] Since the payments under the military and veterans' law are expected to exceed the $15,000 maximum recoverable, there would thus be no recovery of damages in the instant case even if service-incident deaths were held to be compensable under the Federal Tort Claims Act.

Furthermore, in connection with these payments, it is important to note that the availability of workmen's compensation benefits would prevent a civilian from maintaining the instant actions.

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[10] This estimate is based upon the receipt of a $75 monthly payment over an expected life span of 20 years for a 55 year old woman (U. S. Life Tables and Actuarial Tables 1939–1941, Thomas N. E. Greville, Government Printing Office, 1946, p. 37; and see letter from Veterans' Administration, infra, p. 28, stating that appellant was 53 years of age when her husband died in December, 1947 (R. 4)). The estimate also assumes that the appellant will not remarry and thus become ineligible for monthly payments.

[11] In addition, appellant is the beneficiary of a $10,000 United States Government Life Insurance Policy, the proceeds of which are now being paid by the United States to appellant because of the death of her husband. (Appendix, infra, p. 29.)

[12] This Act amended the Illinois Injuries Act, Illinois Revised Statutes, chapter 70, so as to increase the maximum liability in a wrongful death action from $10,000 to $15,000, effective July 18, 1947. *Monroe* v. *Chase*, 76 F. Supp. 278 (E. D. Ill.).

[13] This decision, dealing with the question of diminution of damages, was handed down by the Court of Appeals for the Fourth Circuit on remand of the Brooks case from the Supreme Court.

The above-described payments made to appellant under the military and veterans' laws are identical to workmen's compensation benefits. In fact, the statutory system developed for the care of servicemen and their dependents, and pursuant to which the above-described payments to appellant are being made, contain all of the essential features of workmen's compensation laws applicable to persons disabled or killed in private industry.

34 Both statutory schemes provide for compensation without requiring any proof of fault. In private industry, the disability itself, coupled with the employment relationship, justifies the award. Similarly, for servicemen, the disability or death and the military relationship, support the pension and other Federal payments. Just as the provisions for the workmen's compensation benefits relieve the private employer from any further liability for the death or injury to his employees even though the injured employee might obtain a far greater recovery by suit if he could establish the employer's negligence, the analogous and more generous benefits available to servicemen and their dependents for injuries or deaths incurred incident to their service should, we submit, relieve the United States of any additional liability. Limiting the private employee to workmen's compensation benefits cannot be viewed as discriminating against him even though a third party suffering the same damages through the negligence of the same employer would have access to court action against the employer. Restricting the servicemen to the analogous and more generous benefits of the military and veteran laws similarly cannot be viewed as discriminatory. In both instances, relief for injury or death is not subject to the uncertainties, expense and delay of establishing negligence but is guaranteed through direct, administrative payments.

35 CONCLUSION

For the above reasons it is respectfully urged that rehearing be granted herein and that the judgment of the district court be affirmed.

H. G. MORISON,
Assistant Attorney General,

MAX M. BULKELEY,
United States Attorney,

HENLY E. LUTZ,
Assistant United States Attorney,

PAUL A. SWEENEY,
MASSILLON M. HEUSER,
MORTON HOLLANDER,
Attorneys,
Department of Justice.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay.

MAX M. BULKELEY,
United States Attorney.

DECEMBER 1949.

36

APPENDIX

1. DECISION IN FERES *v.* UNITED STATES

United States Court of Appeals for the Second Circuit

(Argued October 10, 1949. Decided November 4, 1949.)

BERNICE B. FERES AS EXECUTRIX UNDER THE LAST WILL AND TESTAMENT OF RUDOLPH J. FERES, DECEASED, PLAINTIFF-APPELLANT

v.

THE UNITED STATES, DEFENDANT-APPELLEE

Before AUGUSTUS N. HAND, CHASE, and FRANK, Circuit Judges.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR NORTHERN DISTRICT OF NEW YORK

From an order dismissing the above-entitled action brought under the Federal Tort Claims Act, the plaintiff appeals. Affirmed.

AUGUSTUS N. HAND, Circuit Judge: This is an appeal from an order dismissing an action brought by the executrix under the will of Rudolph J. Feres, deceased, against the United States to recover damages under the Federal Tort Claims Act. The decedent, an army lieutenant, while on active duty in the service of the United States, was killed by fire in a barracks in Pine Camp, New York, a military post of the United States in which he had been required to be quartered by superior officers.

37 The complainant alleged negligence on the part of the officers who required the deceased to be quartered in barracks which they knew or should have known to be unsafe due to a defective heating plant and further negligence on the part of the fire guard assigned to the area in which the fire occurred and of the supervisors of the latter. Judge Brennan dismissed the complaint on the authority of United States v. Brooks, 169 F. 2d 840. That decision was by a divided court in the Fourth Circuit. The majority, in an opinion by Judge Dobie, in which Judge Watkins

concurred, held that there could be no recovery on behalf of two soldiers who while on furlough and taking a pleasure drive suffered death and personal injury, respectively, through collision with an army truck. Judge Parker dissented on the ground that the language of the statute allowed suits by soldiers. The majority relied on the analogy to the decisions in this court refusing to allow naval personnel to recover damages under the Public Vessels Act. Dobson v. United States, 27 F. 2d 807, cert. den. 278 U. S. 653; Bradey v. United States, 151 F. 2d 742, 743, cert. den. 326 U. S. 795, rehearing den. 328 U. S. 880.

The Supreme Court reversed the Court of Appeals for the Fourth Circuit in an opinion by Justice Murphy [Brooks v. United States, 337 U. S. 49], from which Justices Frankfurter and Douglas dissented. The majority allowed recovery on the ground that the "accident to the soldiers had nothing to do with the Brooks' army careers," and added (at page 52) "were the accident due to the Brooks' service a wholly different case would be presented. We express no opinion as to it, but we may note that only in its context do Dobson v. United States, 27 F. 2d 807, Bradey v. United States, 151 F. 2d 742, and Jefferson v. United States, 77 F.
38 Supp. 706, have any relevance. See the similar distinction in 31 U. S. C. § 223 b."

The Tort Claims Act provides that the United States shall be liable "in the same manner and to the same extent as a private individual under like circumstances * * *", 28 U. S. C. 2674. There are twelve exceptions to the Act,[1] but they relate to
39 cause of injury rather than to the character of a claimant who may seek to recover damages for his injuries. While

[1] 28 U. S. C. 2680. EXCEPTIONS.
The provisions of this chapter and section 1346 (b) of this title shall not apply to—
(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.
(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.
(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.
(d) Any claim for which a remedy is provided by sections 741–752, 781–790 of Title 46, relating to claims or suits in admiralty against the United States.
(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1–31 of Title 50, Appendix.
(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.
(g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.
(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.
(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.
(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.
(k) Any claim arising in a foreign country.
(l) Any claim arising from the activities of the Tennessee Valley Authority.

they relieve the government in certain situations from liability to all persons including civilians, they do not mention soldiers specifically. There would seem to have been no reason for mentioning soldiers when the latter had not been treated as having claims for injuries incident to their service. See 31 U. S. C. § 223 b.

In the circumstances we see no reason for not adhering to the view we took as to damage claims of military personnel in Dobson v. United States, supra, and Bradey v. United States, supra, and that which Judge Chesnut took in Jefferson v. United States, 77 F. Supp. 706, now on appeal in the Fourth Circuit. If more than the pension system had been contemplated to recompense soldiers engaged in military service we think that Congress would not have left such relief to be implied from the general terms of the Tort Claims Act, but would have specifically provided for it. The only exception to this interpretation of the statute which seems to have been recognized by the Supreme Court in the Brooks case applied to situations where military personnel were not on active duty.

It might be thought that our conclusion is somewhat weakened by the fact that when the Tort Claims Act was introduced in Congress, H. R. 181, 79th Cong., 1st Sess., it contained a thirteenth exception, making the Act inapplicable to "Any claim for which compensation is provided by the Federal Employees Compensation Act, as amended, or by the World War Veterans' Act of 1924, as amended." This exception was omitted in the Act as finally passed. However, the Federal Employees Compensation Act, as amended, provided that as long as an employee is in receipt of compensation under that Act "he shall not receive from the United States any salary, pay or remuneration whatsoever except in return for services actually performed, and except pensions for service in the Army or Navy of the United States * * *" 5 U. S. C. A. § 759. And the World War Veterans' Act of 1924, as amended, provided that "no other pension laws or laws providing for gratuities or payments in the event of death in the service" shall be applicable to disabilities or deaths made compensable under the Act. Consequently, it would seem that the explanation for the omission of the thirteenth exception to the Tort Claims Act is that it was considered unnecessary. We do not, therefore, consider this omission sufficiently significant to require a result contrary to that we have reached.

For the foregoing reasons the order should be affirmed.

2. Decision in Jefferson v. United States

United States Court of Appeals for the Fourth Circuit

ARTHUR K. JEFFERSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE, CIVIL

(Reargued November 8, 1949. Decided December 19, 1949)

Before PARKER, SOPER, and DOBIE, Circuit Judges.

SOPER, Circuit Judge:

41 This suit was brought by a member of the armed forces of the United States under the Federal Tort Claims Act, 28 U. S. C. A. § 2674 et seq., to recover for personal injuries resulting from a surgical operation performed by an army surgeon at Fort Belvoir, Virginia. It was found by Judge Chesnut at the trial in the District Court, 77 F. Supp. 706, that a towel used during an operation had been left in a surgical wound through the negligence of government employees at the hospital, and in consequence the plaintiff had suffered serious injuries for which $7,500 would be an appropriate verdict if the case were tenable. The judge held, however, that the statute was not intended to cover claims by members of the armed forces of the United States for service-connected injuries suffered while in the service. He therefore dismissed the case on motion of the United States and this appeal followed.

In the meantime the Supreme Court, upon an appeal from this court, rendered its decision in Brooks v. United States, 337 U. S. 49, in which it held that two soldiers riding in their own automobile while on leave were entitled to recover for injuries received when they were struck by a United States Army truck driven by a civilian employee of the Army. That decision established that members of the armed forces of the United States can recover under the Federal Tort Claims Act for injuries not incident to their service, but left open the question whether the statute also covers claims by servicemen for injuries incident to their service. The court said (pp. 52–53):

"The Government envisages dire consequences should we reverse the judgment. A battle commander's poor judgment, an army surgeon's slip of hand, a defective jeep which causes injury, all would ground tort actions against the United States.

42 But we are dealing with an accident which had nothing to do with the Brook's army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired. Were the accident incident to the Brooks service, a wholly different case would be presented. We express no opinion as to it, but we may note that only in its context do Dobson v. United States, 27 F. 2d 807, Bradey v. United States, 151 F. 2d 742, and Jefferson v. United States, 77 F. Supp. 706, have any relevance. See the similar distinction in 31 U. S. C. L223b. Interpretation of the same words may vary, of course, with the consequences, for those consequences may provide insight for determination of congressional purpose. Lawson v. Suwannee Fruit & Steamship Co., 336 U. S. 198. The Government fears may have point in reflecting congressional purpose to leave injuries incident to service where they were, despite literal language and other considerations to the contrary. The result may be so outlandish that even the factors we have mentioned would not permit recovery. But that is not the case before us.

Since this decision was rendered, the question not decided by the Supreme Court has been considered in the Second and Tenth Circuits which came to opposite conclusions. In Feres, Ex'r v. United States, 2 Cir., decided Nov. 4, 1949, it was held that the estate of an army officer killed in a fire in unsafe army barracks in which he had been quartered through the negligence of superior officers was not entitled to recovery for his death; but in Griggs, Ex'r v. United States, 10 Cir., November 16, 1949, it was held that the estate of an army officer could recover under the act for his wrongful death caused by the negligence of members of the Army Medical Corps while he was under medical treatment.

43 The Second Circuit based its decision largely upon the provision which Congress has made for military persons in the form of disability payments and pensions. The Tenth Circuit found more persuasive the broad language of the statute and the fact that Congress failed to except connected injuries of military personnel although bills containing such exceptions had been presented for its consideration.

We are in accord with the conclusions reached by the Second Circuit. The choice lies between a literal interpretation of the Act and a construction which recognizes the peculiar relationship that exists between a member of the armed services and superior military authority. Congress was plainly impressed with the large number of justified complaints on the part of persons injured through the negligence of employees engaged in the manifold activities of the federal government, and found it desirable to modify the government immunity from suit and to give relief to injured persons through the procedure of the courts rather than

through private statutes which burdened the legislative branch of the government and caused delay in the consideration of complaints. Hence the Federal Tort Claims Act was passed. It seems unreasonable, however, to conclude that Congress, while accomplishing these desirable purposes, intended at the same time to subject every injury sustained by a member of the armed forces in the execution of military orders to the examination of a court of justice if the injured person should make the claim that his injury was caused by the negligence of a superior officer. If this were so, the civil courts would be required to pass upon the propriety of military decisions and actions and essential military discipline would be impaired by subjecting the command to
44 the public criticism and rebuke of any member of the armed forces who chose to bring a suit against the United States. We think this consideration too weighty to be swept aside by adverting to the exceptions relating to military personnel which were contained in bills submitted to Congress when the matter was under examination. When a statute is subjected to the interpretation of the courts, too much weight should not be given to the language contained in discarded or to the statements of legislators in the course of debate. Order of Conductors v. Swan, 329 U. S. 520, 529. Jewell Ridge Corp. v. Local, 325 U. S. 161, 168.

This conclusion is fortified by the considerations enumerated and relied on in the opinion of Judge Chesnut and take that of the Second Circuit in the Feres case. The distinctively federal character of the government-soldier relationship is recognized in United States v. Standard Oil Co., 322 U. S. 301, 305, where the extent to which state law may govern the relationship between military personnel and persons outside the military establishment was contrasted with the complete subjection to federal authority of the relationship between persons in the military service and the government itself. That state law governs in suits under the Federal Tort Claims Act is shown by the provision that the United States is liable for injuries caused by the negligence of a government employee acting within the scope of his employment under circumstances where a private person would be liable to the claimant under the law of the place where the act of omission occurred, but it is not reasonable to support, in the absence of an express declaration on the point, that Congress intended to adopt so radical a departure from its historic policy as to
45 subject internal relationships within the military establishment to the law of negligence as laid down by the courts of the several states.

The service man is not left without protection by the interpretation of the statute, for as pointed out in the opinion of the

District Court, 76 Fed. Supp. 711, Note 1, Congress has long had in mind the peculiar dangers to which the military man is exposed, and has accordingly made elaborate provisions for pay and allowances and retirement benefits for persons in the Army and the Navy, in addition to medical and hospital treatment, which are always available. An analogous situation in suits by seamen against the United States under the Public Vessels Act led the court to decide that the permission granted to persons to libel the United States in personam for damages caused by the negligent handling of a public vessel refers to damages suffered by third persons but not by members of the ship's company. Dobson v. United States, 2 Cir., 27 F. 2d 807; Bradey v. United States, 2 Cir., 151, F. 2d 742.

Affirmed.

2. Letter From the Veterans' Administration

Veterans' Administration

Washington 25, D. C.

Office of Solicitor.
Your file reference:
In reply refer to: 2 BR XC-6,264,905—Griggs, Dudley Robley.

Mr. H. G. Morison,
Assistant Attorney General, Claims Division,
Department of Justice, Washington 25, D. C.

Dear Mr. Morison: Pursuant to your recent request for information concerning payment of benefits to Edith Louise
46 Griggs under veterans' laws, this is to advise that the records of the Veterans' Administration reflect the following payments:

Pension or Death Compensation

A total amount of $2,155.20 has been paid to Edith Louise Griggs, as unremarried widow with one minor child, to and including the month of November 1949, at which time the monthly payments were $100. Effective December 1, 1949, monthly payments were increased to $105, pursuant to Public Law 339, 81st Congress. However, on January 11, 1950, the child will reach an age at which entitlement to benefits will cease, under present law, and the widow's monthly payments will be reduced to $75. Payments of death compensation are to continue during the lifetime of the widow while she remains unremarried.

INSURANCE

Under United States Government (Converted) Insurance, Policy No. K–1,200,611, issued to Dudley R. Griggs, a total amount of $1,257.60 has been paid to Edith Louise Griggs, as beneficiary, through the month of November 1949, in installments of $52.40 per month, effective December 18, 1947. Payments under this policy to continue during the lifetime of the widow (240 months certain). The widow was 53 years of age at the time of death of Dudley R. Griggs.

Very truly yours,

(S) Edward E. Odom,
EDWARD E. ODOM,
Solicitor.

47 3. LETTER FROM THE DEPARTMENT OF THE ARMY

DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF FINANCE
WASHINGTON 25, D. C.

Your file reference: 157–13–7.

DECEMBER 21, 1949.

CSACF–E1 201 Griggs, Dudley R., O–193589.

Mr. H. GRAHAM MORISON,
Assistant Attorney General,
Claims Division, Department of Justice.

DEAR SIR: In compliance with your telephone request the following information is furnished: six months' death gratuity in the case of Dudley R. Griggs, Lieutenant Colonel O–193589, was paid to Edith L. Griggs designated widow, 1961 Kearney Street, Denver 7, Colorado, 12 January 48 in the amount of $2,695 on Voucher No. 70186–4 account of S. H. Smith, Lieutenant Colonel, FD, symbol 210–684.

Sincerely yours,

JOHN PALSROK,
Major, FD, Asst. Rec. & Disb. Div.

[File endorsement omitted.]

48 In United States Court of Appeals

Order denying petition for rehearing

January 9, 1950

This cause came on to be heard on the petition of appellee for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

In United States Court of Appeals

Order staying mandate

January 14, 1950

On January 14, 1950, an order of the United States Court of Appeals was entered staying the mandate of the said court for a period of thirty days under provision of paragraph 3 of rule 28 of said court.

49 [Clerk's certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1950

Supreme Court of the United States

Order allowing certiorari

Filed May 8, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted. The case is transferred to the summary docket and assigned for argument following Feres, as Executrix vs. United States of America, and Jefferson vs. United States of America, Nos. 558 and 667 which are also transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.